vivor simply keeps what he or she had before.[21] There is no increase in the estate, and the change is in the person rather than in the estate.[22]

Therefore the holding that the widow received a right of homestead at the time of the filing of the deed seems correct.[23] If this be carried to its logical conclusion, it would seem that there may be two persons in the family who have a vested right to claim exemptions: (1) the husband as head of the family under the Homestead Act[24] and (2) the wife by reason of the Married Woman's statute.[25] But it has been repeatedly held that as between husband and wife there can be only one right of homestead, and that right must be asserted in the name of the husband because so long as the marriage relation exists *de jure*, he must be regarded the head of the family.[26]

In the instant case the court correctly solves the problem by holding that while the right vests in both spouses, its exercise by one precludes exercise by the other.[27] W. J. H.

TORTS—AUTOMOBILE GUEST STATUTE—STATUS OF PERSON WHO CONTRIBUTES TOWARD TRAVELING EXPENSES—[Texas].—A Texas statute[1] requires proof of ordinary negligence in the case of a passenger for hire and gross negligence in the case of a guest, defining the latter as one who rides in another's car "without payment." In a recent decision[2] the Court of

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the incidents of joint estates the author says, "and therefore, if an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common; for husband and wife being considered as one person in law they cannot take the estate by moieties, but both are seized of the entirety, *per tout et non per my.*" See also Goldberg Plumbing Supply Co. v. Taylor (1922) 209 Mo. App. 98, 237 S. W. 900.

21. Ashbaugh v. Ashbaugh (1918) 273 Mo. 353, 201 S. W. 72.

22. Garner v. Jones (1873) 52 Mo. 68; Rezabek v. Rezabek (1916) 196 Mo. 673, 192 S. W. 107; Fulbright v. Phoenix Ins. Co. (1932) 329 Mo. 207, 44 S. W. (2d) 115; In re Staiger's Estate (1929) 104 N. J. Eq. 149, 144 Atl. 619; In re Dell's Estate (1935) 154 Misc. 216, 276 N. Y. S. 960; Newsome v. Shackleford (1931) 163 Tenn. 358, 43 S. W. (2d) 384.

23. R. S. Mo. (1929) sec. 615.

24. R. S. Mo. (1929) sec. 608.

25. R. S. Mo. (1929) sec. 2998.

26. Gladney v. Berkley (1898) 75 Mo. App. 98; Martin v. Barnett (1911) 158 Mo. App. 375, 138 S. W. 538.

27. In Morrow v. Zane (1914) 185 Mo. App. 111, 170 S. W. 918, the Springfield Court of Appeals held however that the wife had in effect two estates: (1) her own by the entirety which was acquired prior to the incurring of the debt and in which she therefore could claim homestead; (2) her husband's estate by the entirety which was acquired by his deed conveying his interest to her subsequent to the incurring of the debt and in which she therefore could not claim homestead. The court apparently bases its conclusion upon the idea that at common law estates by the entirety were divisible because the husband had right to possession and usufruct of such lands during marriage and his interest was vendible. But see Hall v. Stephens (1877) 65 Mo. 670, 27 Am. Rep. 302; National Bank of Plattsburg v. Fry (1902) 168 Mo. 492, 68 S. W. 348, and the authorities cited in notes 13, 14, 15, and 16, supra.

1. Tex. Vernon's Stat. (1936) c. 225, art. 6701b.

2. Raub v. Rowe (Tex. Civ. App. 1938) 119 S. W. (2d) 190.

Civil Appeals declared that where two persons set out to visit a relative, the fact that plaintiff paid her share of the running expenses of the automobile did not alter her status as a guest "without payment" under the statute.

The court was called upon to construe the words "without payment" in the Texas statute, which also appear in similar statutes in other states.[3] Relying chiefly on two California decisions,[4] the Texas court decided that payment of gas and oil expenses under the circumstances of the present case was not sufficient to constitute "payment" under the statute. Decisions under similar statutes in Ohio,[5] New York,[6] Michigan,[7] and Massachusetts[8] have indicated that contributions toward gasoline and oil expenses on a social trip do not change a guest's status into one of passenger for hire.[9] Courts in the same states, however, have uniformly agreed that, where the hiring of the vehicle is for the business purposes of the owner, no guest relationship is involved.[10] It is the zone between the clearly social and the clearly business trips which has given rise to troublesome problems.[11]

Despite the decisions in the above cases, it has been held that under special facts a guest may become a passenger for hire. For example, in *Beer v. Beer*[12] an Ohio court held that where a brother and sister shared expenses on a trip to visit their father who was ill, the sister occupied the position of passenger for hire and not a guest. A Washington court[13] has indicated that if there is an *express* agreement by the parties to share the expenses of a trip, the relationship of passenger for hire is established.[14] The matter has never arisen in Missouri because there is no statute which differentiates between a guest and a passenger for hire. A Missouri statute,[15] which imposes the highest degree of care upon a person who is driving another in his automobile, has been held to extend to one carried as a guest.[16]

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3. Cal. Deering's Gen. Laws (1931) art. 5128, sec. 141¾; N. D. Laws (1931) c. 184, 310; Ohio Page's Ann. Gen. Code (1926) sec. 6308-6; Wash. Rem. Rev. Stat. (1933) c. 18, art. 6297-1, sec. 2.

4. McCann et al. v. Hoffman et al. (Cal. App. 1936) 62 P. (2d) 401; Rogers v. Vreeland (Cal. App. 1936) 60 P. (2d) 585.

5. Ernest v. Bellville (1936) 53 Ohio App. 110, 4 N. E. (2d) 286.

6. Olefsky v. Ludwig (1934) 242 App. Div. 637, 272 N. Y. S. 158.

7. Morgan v. Tourangeau (1932) 259 Mich. 598, 244 N. W. 173.

8. Perkins v. Gardner (1934) 287 Mass. 114, 191 N. E. 350.

9. 4 Blashfield, *Cyclopedia of Automobile Law and Practice* (1935) 87, sec. 2293.

10. Smith v. Fall River Joint High School District (1931) 118 Cal. App. 673, 5 P. (2d) 930; Casper v. Higgins (1935) 4 Ohio Ops. 164; Elkins et ux. v. Foster (Tex. 1936) 101 S. W. (2d) 294; Woodman v. Hemet Union High School District (1934) 136 Cal. App. 544, 29 P. (2d) 257; 95 A. L. R. (1935) 1180.

11. Note (1937) 12 Wash. L. Rev. 138.

12. (1935) 4 Ohio Ops. 84.

13. See Eubanks v. Kielsmeier (1933) 171 Wash. 484, 18 P. (2d) 48, 49.

14. See also Elliott v. Behner (1937) 146 Kan. 827, 73 P. (2d) 1116; Campbell v. Campbell (1932) 104 Vt. 468, 162 Atl. 379, 85 A. L. R. 626.

15. R. S. Mo. (1929) sec. 7775.

16. Kaley v. Huntley (Mo. 1933) 63 S. W. (2d) 21.

The instant case illustrates the difficulty encountered in the attempt to abide by the strict letter of the statute[17] on the one hand and at the same time to construe the term "payment" so as to reduce the number of collusive suits against insurance companies,[18] by extending the class of persons carried as guests.

A. E. H.

TORTS—RES IPSA LOQUITUR—RIGHT OF CONTROL WITHOUT EXCLUSIVE CONTROL—[Missouri].—Plaintiff customer was injured when a bolt of awning material displayed for sale fell upon her from an open counter in the defendant's store. Plaintiff relied upon the doctrine of *res ipsa loquitur*. *Held*, though defendant had sufficient right of control as required by the doctrine, plaintiff failed to exclude the probability that the accident was caused by the negligence of a third person, and therefore could not recover on the theory of *res ipsa loquitur*.[1]

The doctrine of *res ipsa loquitur* has been held applicable to cases where a customer is injured by falling merchandise.[2] In these cases the falling merchandise was not subject to inspection by the customers. In the instant case, however, the merchandise was open for inspection and handling by many customers. The storekeeper, therefore, did not have exclusive control, although he had the right of control.[3] Most jurisdictions require that the defendant have exclusive control over the article[4] and deny recovery where

17. See dissent in Voelkl v. Latin (Ohio App. 1938) 16 N. E. (2d) 519.

18. Note (1936) 10 U. of Cin. L. Rev. 289; Note (1937) 12 Wash. L. Rev. 138.

1. Hart v. Emery, Bird, Thayer Dry Goods Co. (Mo. App. 1938) 118 S. W. (2d) 509.

2. Garfinkel v. B. Nugent & Bros. Dry Goods Co. (Mo. App. 1930) 25 S. W. (2d) 122; Perry v. Stein (Mo. App. 1933) 63 S. W. (2d) 296; Crawford et al. v. American Stores Co. (1927) 5 N. J. Misc. 413, 136 Atl. 715; Higgins v. Ruppert (1908) 7 App. Div. 530, 108 N. Y. S. 919; Higgins v. Goerke-Krich Co. (1918) 91 N. J. L. 464, 103 Atl. 37, aff'd in 92 N. J. L. 424, 106 Atl. 394. However, in the case of Martin v. Brown (1936) 56 Idaho 379, 54 P. (2d) 1157, the court refused to apply the doctrine of *res ipsa loquitur* to the case of a falling timber in a lumber yard on the ground that the accident was not so obviously destructive as to require that the doctrine be used. This reasoning could very well be used in all cases of falling merchandise in a store.

3. Hart v. Emery, Bird, Thayer Dry Goods Co. (Mo. App. 1938) 118 S. W. (2d) 509; Guttman v. F. W. Woolworth Co. (1936) 159 Misc. 821, 288 N. Y. S. 819.

4. Harper, *Torts* (1933) 183, sec. 77; The President Wilson (D. C. N. D. Cal. 1933) 5 F. Supp. 684; Blade v. Site of Fort Dearborn Bldg. Corp. (1927) 245 Ill. App. 484; Black Mountain Corporation v. Partin's Adm'r (1932) 243 Ky. 784, 49 S. W. (2d) 1015; Goldman v. City of Boston (1931) 274 Mass. 329, 174 N. E. 686; Murray v. Great Atlantic & Pacific Tea Co. (1932) 236 App. Div. 477, 260 N. Y. S. 132; Carter Oil Co. v. Independent Torpedo Co. (1924) 107 Okla. 209, 232 Pac. 419; Dittert v. Fischer (1934) 148 Ore. 366, 36 P. (2d) 592; U. S. Torpedo v. Liner (Tex. App. 1927) 300 S. W. 641.